United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Original Binding Copy

MG — 76-7340

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EDMOND PFOTZER AND E. JOHN PFOTZER, ETC.

Plaintiffs - Appellants,

v.

AMERCOAT CORPORATION AND AMERON, INC.

Defendants - Appellees

BP/S

U.S. DISTRICT COURT, DISTRICT OF CONNECTICUT
Civil No. B-947

U.S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT
Docket No. 76-734[illegible]

ON APPEAL FROM U.S.D.C. CONNECTICUT
RULING DENYING PLAINTIFFS' MOTION
TO SET ASIDE STIPULATION OF DISMISSAL

Sat below: Newman, D.J.

PETITION FOR REHEARING IN BANC

Edmond Pfotzer and E. John Pfotzer
Appellants pro se
P.O.Box 987
Wilmington, Delaware 19899
Tel: (302) 571-0595

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STATEMENT

Petitioners (Pfotzers) submit this memorandum in support of their "Petition For Rehearing" pursuant to the Court's adverse decision of January 13, 1977 in the matter of their:

"APPEAL FROM U.S.D.C. CONNECTICUT RULING DENYING PLAINTIFFS' MOTION TO SET ASIDE STIPULATION OF DISMISSAL"

Petitioners, respectfully inform the Court, as the basis for their petition for rehearing, that in their opinion, there has been a material misapprehension by the Court of several of the key facts involved, and that there are pertinent decisions existent which it is submitted embody principles of law which were not given due consideration by the Court.

STATEMENT OF FACTS

At the outset appellants assert they are unable to concede that the Court's apparent conclusions, and application of related law as contained in its decision of January 13, 1977, are sufficient and correct as a foundation for said decision and such lack of concurrence is for the following reasons.

(1) The Court pointedly ignored the legal effect of the "failure of defendants' consideration" for the subject "Stipu-

lation of Dismissal" of November 11, 1974.

(2) The Court disregarded the fact that whereas appellants have six years' time within which to sue for "breach of contract" following defendants' "failure of consideration", it nevertheless arbitrarily applied an "inequitable and unconscionable one year time bar" to affirm denial of appellants' motion to vacate the "Stipulation of Dismissal" of November 11, 1974.

(3) The Court overlooked or misapprehended the significance of the fact that the defendants had affirmatively timed their involved fraud, to preclude these appellants from timely moving to vacate the "Stipulation of Dismissal" with prejudice, within a one year period, following the "Stipulation of Dismissal".

(4) The Court's subject decision obviously countenances, in its effect, that the defendants' fraud on the Superior Court of Connecticut, the United States District Court of Connecticut, and on these appellants, like virtue, is its own reward, even if in this instance at appellants' expense.

(5) The Court failed to follow the Supreme Court's applicable teaching as set out in Klapprott v. U.S. (1949) 335 U.S. 601, 614-615 as involving FRCP 60(b)(6) "For any other reason to provide justice".

(6) The Court clearly failed to follow the Supreme

Court's applicable teaching as set out in Haines v. Kerner, 404 U.S. 519 (1972) although the Court had cited said case in its decision.

(7) The Court's several citations in support of its several conclusions, including its inability "...to reach the merits of the dispute..." without exception involved cases as were heard on their merits, whereas at no time was a hearing had on the merits of appellants' involved action despite the fact that: "...it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief" as quoted in Haines v. Kerner 404 U.S. 519 (1972).

(8) The Court has used several citations to support its decision (pp. 1404-1406 Slip Opinion) which are in conflict with analogous holdings in the Second Circuit, and which conflict introduces aspects of arbitrariness in the said decision.

(9) In the interest of essential brevity appellants incorporate by reference the entire content of their prior submittals including appellants' "Brief", "Reply Brief", and "Supplemental Legal Citations".

ARGUMENT

POINT I

REHEARING IS APPROPRIATE WHERE COURT HAS ERRED ON THE LAW OR FACTS.

Appellants herein petition for rehearing in accord with Rule 40 - Petition for Rehearing of FRAP.

Said rehearing is requested in that it is appellants' opinion, that this court overlooked significant points of law and fact, and which, had they been duly considered, would have had a controlling effect in the formulation of the court's decision, in favor of appellants.

POINT II

THE COURT'S OPINION HAS POINTEDLY IGNORED "THE FAILURE OF CONSIDERATION THRUST" AS IS CONTAINED IN APPELLANTS' APPEAL

Appellants submit that the Court, in its decision of January 13, 1977, did not in fact address itself to the several issues involved in the context of the total situation as were before it.

Said issues appear on page 2 of appellants' "Brief". The Court's decision indicates that it gave no judicial consideration to subparagraph (a) thereof which basically

raised the question of "failure of consideration for the contract" (stipulation); namely:

"(a) There was a subsequent failure of defendants' consideration as had been promised the plaintiffs for their participation in the said stipulation?"

Appellants (Pfotzers) fully covered this basic aspect of consideration in Points IV, V, and IX, of their "Brief". However, the Court's opinion clearly states (p. 1405 Slip Opinion) that the points of law involved were not considered and reflected in its decision.[1]

Pursuantly, it is submitted that the Court overlooked the basic legal premise that: "The stipulation to consolidate and litigate without prejudice was the basic consideration, a 'sine qua non' for the 'Stipulation of Dismissal' contract of November 11, 1974" (lines 24 to 27, p. 25 of appellants' "Brief") and that the defendants' consideration failed as a consequence of its involved fraud upon both the Court and these appellants. By application of the Erie R. Co. v. Tompkins doctrine expounded in Ruhlin v. New York Life Insurance Co. (1938) 304 U.S. 202 this aspect should have been decided in accord with Bryan v. Reynolds, 143 Conn. 456.

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[1] "We cannot, however, reach the merits of this dispute...."

POINT III

SINCE "FAILURE OF CONSIDERATION" IS BREACH OF CONTRACT (AND A STIPULATION AS HEREIN IS A CONTRACT) THE ONLY TIME BAR WHICH COULD BAR PLAINTIFFS' MOTION TO VACATE THE SUBJECT STIPULATION WOULD BE THE SIX YEAR TIME PERIOD SINCE THE FAILURE OF CONSIDERATION HAS NOT YET ELAPSED.

Appellants in Points IV, and IX of their "Brief" stressed the failure of consideration as involved in their subject motion to vacate the "Stipulation of Dismissal" of November 11, 1974. Pertinently:

> "A 'failure of consideration' occurs where, without his fault, one who has given or promised to give some performance fails to receive in some material respect the agreed exchange for such performance."
>
> . . . . .
>
> "The word 'consideration' as used in the term 'failure of consideration', means the promised performance of one part agreed to be exchanged for that of the other. There is a failure of consideration where one who has given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for the performance." Durkee v. Busk, 355 P. 2d 588.

POINT IV

SINCE PLAINTIFFS COULD SUE FOR DAMAGES FOR BREACH OF CONTRACT, BASED ON FAILURE OF CONSIDERATION, AND HAVE SIX YEARS' TIME TO DO SO, IT IS INEQUITABLE, UNCONSCIONABLE AND DENIAL OF DUE PROCESS TO APPLY ONE YEAR TIME BAR (UNDER FRCP RULE 60 (b) TO AFFIRM DENIAL OF THEIR MOTION TO VACATE THE STIPULATION (CONTRACT).

Appellants respectfully submit that this court has overlooked the applicable point of law, as is inextricably

involved herein; namely: the failure of defendants' consideration (see Points II and III supra).

Specifically, when the issues involve one party's breach of a settlement agreement, the federal courts have uniformly ruled that:

"Of course the District Court has jurisdiction to vacate its own orders of dismissal which were based upon the stipulation of the parties in reliance upon their settlement agreement. Rule 60(b), Fed. Rules Civ. Proc. However, the District Court appears to have been of the view that the dismissal of the original actions with prejudice deprived it of jurisdiction to entertain the ancillary complaints seeking enforcement of the settlement agreement. But there can be no question of the power of a federal district court to vacate its own orders entered in civil actions over which it had original jurisdiction "whenever such action is appropriate to accomplish justice, Klapprott v. United States 335 U.S. 601-615", Kelly v. Greer 334 F 2d 434 (1964-CA-3d Cir.).

POINT V

THE COURT OVERLOOKED THE FACT THAT DEFENDANTS HAD AFFIRMATIVELY TIMED THEIR FRAUD TO PRECLUDE APPELLANTS' MOVING TO VACATE THE PRIOR DISMISSAL WITH PREJUDICE WITHIN A ONE YEAR PERIOD FOLLOWING THE STIPULATION OF DISMISSAL

Appellants (Pfotzers), page 35 of their "Brief", quoted an excerpt from the United States Supreme Court's decision, Bailey v. Glover (Sup. Ct. Oct. 1874) which had direct application to the subject issue of defendants' fraud; namely:

> "To hold that by concealing a fraud or committing a fraud in a manner that it concealed itself until such a time as the party committing a fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent frauds the means by which it

is made successful and secure."

Pursuantly, appellants point out that the Court (page 1405, Slip Opinion) stated: "Rule 60 provides that the Pfotzers' motion be made...not more than one year after the judgment, order or proceeding was entered or taken..."[2]

Appellants had stated (Appellants' Brief - pp. 13, 14, 25, 30 and 48) that defendants had initially waited until December 3, 1975 and March 16, 1976--one year and 22 days after the subject November 11, 1974 "Stipulation of Dismissal" before they repudiated by fraud the said stipulation.

Pertinently, the Court is necessarily respectfully asked: How could the appellants (Pfotzers) have made their motion to vacate the stipulation within the period, "...not more than one year after the judgment etc." inasmuch as the fraud was not perpetrated until after the passage of one year's time?

It is accordingly clear the defendants had accurately anticipated this Court's finding, and upon which it has erroneously predicated its decision--for the defendants waited 22 days beyond a one year period to finalize its fraud. To this date defendants have succeeded in utilizing the unintended shelter of Rule 60(b) "Statute of Limitations" to protect it. In doing so, and by virtue of this Court's erroneous

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[2] This one year period does not apply to Rule 60(b) which reads: "(6) any other reason justifying relief from the operation of the judgment", and the latter sub-section is subject only to a "reasonable time" limitation.

decision defendants now use "the law which was designed to prevent frauds the means by which it is made successful and secure." and to appellants' great damage.

POINT VI

THE COURT CONCLUDED THAT THE FRAUD, IF ANY, WAS ON THE SUPERIOR COURT, NOT ON THE DISTRICT COURT, AND OVERLOOKED THE EFFECT OF FRAUD ON THE SUPERIOR COURT, WHICH WAS TO ESTABLISH FAILURE OF CONSIDERATION FOR THE STIPULATION IN THE DISTRICT COURT

This court's conclusion is to the effect that if there was any fraud it was not on the District Court below, but on the Connecticut Superior Court (pp. 1405-6, Slip Opinion).

Clearly, assuming, arguendo, there was fraud on the Connecticut Superior Court, would this fraud not constitute "failure of consideration" for the stipulation made in the District Court, since the District Court stipulation was based on the Superior Court stipulation dishonored by defendants' fraud?

If the above is true, are not plaintiffs entitled to be heard on the merits, in the District Court, on their contention of the District Court stipulation being subject to vacatur for the reason that the contract (the Superior Court stipulation) which gave birth to it was breached by failure of consideration?

This approach respectfully shows this Court erred in its

conclusion at law "that the fraud, if any, was on the Superior Court, not on the District Court." Judge Newman had no duty to ascertain whether the settlement confirmed with the Superior Court stipulation; "it sufficed for the court to know the parties had decided to settle, without inquiring why". (Underlining supplied)

The above underlined segment of the opinion clearly does not and cannot apply to a settlement which is subsequently attacked for fraud in the inducement, and failure of consideration, and is accordingly inappropriate to the factual complex at bar and to appellants' contentions.

Apropos, appellants suggest that the total evidence they have set out in their several briefs is sufficient to justify this court decreeing that there was such a commingling of planned fraud, trick or artifice or other fraudulent conduct on the part of defendants' counsel in both cases, that such would reasonably support a decision to remand the case to the court below for a more definite determination as was mandated by federal courts under generally analogous situations. Hazel-Atlas Glass Co. v. Hartford Empire Co. 332 U.S. 238-271 (1943 Oct. Term), Marine Ins. Co. v. Hodgson, 7 Cranch (US) 322, 3 L. Ed. 362, Root Refining Co. v. Universal Oil Products Co. 169 F 2d 514 (1948-CA-3d Cir.), Sprague v. Taconic National Bank, 307 U.S. 161, 167, Hadden v. Ramsey Products et al, 196 F2 92 (1952-CA-2d Cir.), Charles Pfizer & Co. v.

Davis-Edwards Pharmacal Corp. 385 F 2d 533 (1967-CA-2d Cir.), United States v. Cato Bros. et al 273 F 2d 153 (1959-4thCCA).

POINT VII

THE COURT'S SUBJECT DECISION IS TO THE EFFECT THAT DEFENDANT'S FRAUD, LIKE VIRTUE, IS ITS OWN REWARD, AND IN THIS INSTANCE, AT APPELLANTS' EXPENSE

Appellants (Pfotzers) submit that the totality of the well-supported allegations appellants have set out in their two involved briefs is to the effect that the defendants are successful wrongdoers. Suffice it to say after having subjected the appellants to six and one half years of wrongful, costly and harassing litigation--that on the eve of the euphemistically termed "day of truth"--they collusively succeeded in withdrawing their respective actions (paragraph 8 on pages 12, 13 and 14 of appellants' "Brief").

Does this Court believe that such withdrawals by the defendants and the City of Norwalk, on the eve of the trial date, in the face of their contracts (stipulations of September 9, 1974 and November 11, 1974), are likely actions of litigants who have alleged they had been injured by these plaintiffs? Or is the contrary thesis the more probable likelihood?

Nevertheless, the clear record in this case to date is--

that the defendants' fraud is like virtue, its own reward, and at appellants' expense. The latter contrast, parallels a comparable fraudulent development and like contrast as set out in Publicker, Appt. v. Shallcross et al, 106 F2d 949 (CCA-3rd Cir-1939). But which albeit did not succeed despite the lapse of two years following the lower court's original decree in its favor. In its pertinent decision the Third Circuit in affirming the lower court's vacating of its original decree as secured by fraud, stated:

"In our judgment, and if the case arises, the harsh rule of United States v. Throckmorton, above cited, will be modified in accordance with the more salutary doctrine of Marshall v. Holmes above cited. We believe the truth is more important than the trouble it takes to get it."

Pursuantly, appellants are of the opinion that the aforesaid principle is particularly applicable to a just decision in the instant case and in accord with Rule 60(b)(6) of F.R.C.P.

POINT VIII

THE SUPREME COURT IN KLAPPROTT V. U.S. (1949), 335 U.S. 601, 614-615, HAS LIBERALLY INTERPRETED THE PROVISION OF F.R.C.P. 60(b)(6) "FOR ANY OTHER REASON" TO PROVIDE "JUSTICE" AND NOT TO OTHERWISE ACCOMPLISH ITS FRUSTRATION AS TO DATE IN THE SUBJECT ACTION

This Court, in considering the application of Rule 60 (b), was clearly intent on limiting its scope to the confines

of its own narrow definition of "fraud on the court", and in no manner permitting its equitable consideration to include the applicable provisions of sub-paragraph (6) "for any other reason" as appropriate and as necessary to accomplish justice.

Appellants contend that the facts involved in support of the subject issues (as set out in Points II to VII supra) were of a character and of such sustaining weight to have properly induced this Court to invoke Rule 60(b)(6) so as to accomplish justice. This latter federal rule, 60(b)(6), has been long considered a general residual clause as essential to cover unforeseen contingencies; and as herein involved. The latter even at the risk of undercutting the principle of exclusiveness at which amended 60(b) was generally directioned. Said residual residual rule clause has been termed "the grand reservoir of equitable power to do justice in particular cases and, under sub-division (6), any other reason justifying relief from the operation of the judgment."

The only time limitations upon relief under sub-division (6) is one of appeal within "reasonable time". Certainly "reasonable time" was exhibited by the appellants; as following defendants' manifestations of fraud on December 3, 1975 and March 16, 1976, respectively, (pp. 32 to 35 of appellants' "Brief"--and specifically the 2nd paragraph on page 34 thereof).

Appellants respectfully point out to the Court that the Supreme Court in Klapprott v. U.S. (1949), 335 U.S. 601, 614-615, set forth the standard for the proper use of this rule; namely: that justice not be denied and that a trial be given on the merits. This vital issue of a "trial on the merits" is in fact before this Court--to the end that due process "not be denied". "The invocation of the rule is appropriate whenever necessary to accomplish justice." Hyjack et al v. Nolan, (Law Div., Superior Ct., 1976), 144 N.J. Super. 545 366 A2d 715, 720.

The Supreme Court (pp. 614-615) of its decision in Klapprott stated:

> "....Furthermore 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

At bar, it is evident this Court has not applied the controlling standard set forth in Klapprott, supra.

POINT IX

THE COURT FAILED TO FOLLOW HAINES V. KERNER 404 US 519 (1972) AND SIGNIFICANTLY FAILED TO IMPLEMENT ITS TEACHING, ALTHOUGH CITING IT.

The Court, on page 1405 (Slip Opinion), has stressed, by

means of its reference to Haines v. Kerner, 404 U.S. 519 (1972), that it has considered plaintiffs' motion and affidavits liberally. Yet, despite the totality thereof, the Court has otherwise adopted the conclusion "...parties could not agree among themselves as to the actual meaning of the stipulation before State Trial Referee O'Sullivan" (see pp. 84a, 85a and 86a), ostensibly as a controlling aspect.

As pertinent to the foregoing, appellants assert that it is essential to compare the language of Haines v. Kerner, supra, and as set out infra, with the applicable substance of this Court's opinion supra; namely:

"We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief" Conley v. Gibson, 335 US 41, 45-46 (1957). See Dioguardi v. Durning, 139 F 2d 774 (CA2 1944).

Accordingly, although we intimate no view whatever on the merits of petitioner's allegations, we conclude he is entitled to an opportunity to offer proof. The judgment is reversed and the case is remanded for further proceedings consistent therewith."

It is respectfully suggested this Court, despite its reference to Haines v. Kerner, 404 U.S. 519 (1972), did not accord the pro se appellants herein like consideration under the facts and circumstances as were clearly set out in their pertinent affidavit etc., and consequently the Court is requested to duly scrutinize appellants' pertinent references as support their statement of declared issues herein.

POINT X

FEDERAL AND STATE COURTS HAVE BEEN VIRTUALLY UNANIMOUS IN VACATING PRIOR JUDGMENTS AS WERE SECURED BY TRICK, ARTIFICE OR OTHER FRAUDULENT CONDUCT AND INVOKING FED. RULES CIV. PROC. RULE 60(b) (6), 28 U.S.C.A. FOR VACATUR

Appellants respectfully submit that the Court's conclusions, and decision as set out (on pages 1404, 1405, and 1406 of Slip Opinion) are not in accord with the virtually unanimous decisions of courts of coordinate jurisdiction. The foregoing as pertinent to the applicability of F.R.C.P. Rule 60(b)(6), 28 U.S.C.A. to facts, and circumstances generally analogous to those as set out under appellants' "Facts" as appear on pages 6 to 14 of appellants' "Brief".

Pursuantly, said courts of coordinate jurisdiction have decreed that:

(p. 1073) An attorney's loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court, and, when he departs from that standard, he perpetrates a "fraud upon the court" within savings clause of rule governing relief from judgment or order. Fed. Rules Civ. Proc. Rule 60(b) (1,3), 28 U.S.C.A., Kupferman v. Consolidated Research & Mfg. Corp., 459 F 2d 1072 (1972 - 2d Cir.)

(p. 244) From the beginning there has existed along-

side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. Marine Inc. Co. v. Hodgson, 7 Cranch (US) 322, 3 L Ed 362., Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 US-238-271 (1943 Oct. Term)

(p. 518) As quoting from the Supreme Court in 328 US page 580: "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. Hazel-Atlas Co. v. Hartford-Empire Co., 322 US 238, 64 S. Ct. 997, 88 L. Ed. 1250. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs. Sprague v. Toconic National Bank, 307 US 161, 167, 59 S. Ct. 777, 780, 83 L. Ed. 1184, Root Refining Co. v. Universal Oil Products Co., 169 F 2d 514 (1948-CA-3d Cir.)

(p. 95) Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that on motion and upon such terms as are just, the court may relieve a party from a final judgment for fraud, misrepresentation or other misconduct of an adverse party. Hadden v. Ramsey Products et al., 196 F 2d 92 (1952-CA 2d Cir.)

(p. 435) 3. Orders dismissing actions with prejudice would be vacated after defendant refused to carry out terms of settlement agreement which was basis of dismissal of actions within district as well as other civil actions, actions within district would be in status quo, existing immediately following reading of settlement agreement into record, nonresident defendant would be required to return removed property which was in dispute and which was basis of jurisdiction and Federal District Court could then proceed to determine whether non resident defendant in agreeing to settlement plan had submitted to jurisdiction over her person. 28 U.S.C.A. § 1655., Kelly v. Greer, 334 F 2d 434 (1964-CA-3d Cir.).

(p. 608) (24) "Any other reason" subsection of rule provision for relief from judgment or order means to make available those grounds which equity long recognized as basis for relief. Fed. Rules Civ. Proc. Rule 60(b), 28 U.S.C.A., Bros. Inc. v. W. E. Grace Mfg. Co., 320 F 2d 594 (1963-CA-5th Cir.).

(p. 537) Appellant's second point is based upon Fed. Rules Civ. Proc. Rule 60(b)(5), which provides that a court may relieve a party from a final judgment if "it is no longer equitable that the judgment should have prospective application". Charles Pfizer & Co. v. Davis-Edwards Pharmacal Corp., 385 F 2d 533 (1967-CA-2d Cir.).(N.B. Re: Res Judicata etc.)

(p. 157) In general, relief from judgments has been given under subsection (6) in cases where the judgment was obtained by the improper conduct of the party in whose favor it was rendered....under circumstances not covered by subsections (1) to (5) which, in the opinion of the court, required the application of subsection (6) in order that the case be tried on its merits and justice be done. United States of America v. Cato Brothers Inc. et al., 273 F 2d 153 (1959-4th Cir.).

(p. 606) (16) Relief sought, that to be granted, or within the power of court to grant, should be determined by substance, not by label. Fed. Rules Civ. Proc. Rule 1, USCA., Bros Inc. v. W. E. Grace Mfg. Co., 320 F 2d 594 (1963-CA 5th Cir.).

(p. 95) Although Rule 3 states that an action is commenced by filing a complaint it would be quite out of harmony with the spirit of Rule 1 to hold the appellees bound by the labels placed on the papers submitted to the District Court. Hadden v. Ramsey Prod. et al., 196 F 2d 92 (1952-CA 2d Cir.).

POINT XI

INTRA-CIRCUIT CONFLICT IN CASE AT BAR AND SECOND CIRCUIT OPINIONS WARRANT IN BANC HEARING

Appellants submit that the Court's several citations as set out to support its decision (pp. 1404-1405 and 1406 of Slip Opinion) are in conflict with the following pertinent Second Circuit decisions; namely: Kupperman v. Consolidated Research & Mfg. Corp. 459 F2d 1072 (1972-2d Cir.); Charles Pfizer & Co. v. Davis Edwards Pharmacal Corp., 385 F2d 533 (1967-CA-2d Cir.); Hadden v. Ramsey Products et al 196 F2d 92 (1952-CA-2d Cir.); and which it is respectfully suggested warrants in banc rehearing.

Because of its relevancy, the Court's attention is correlatively invited to the headnote of Point X which reads:

> FEDERAL AND STATE COURTS HAVE BEEN VIRTUALLY UNANIMOUS IN VACATING PRIOR JUDGMENTS AS WERE SECURED BY TRICK, ARTIFICE OR OTHER FRAUDULENT CONDUCT AND INVOKING FED. RULES CIV. PROC. RULE 60(b)(6), 28 U.S.C.A. FOR VACATUR

Pursuantly, it is appellants' opinion that the foregoing related aspect may also induce the Court to grant appellants'

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CONCLUSION

WHEREFORE, since the Court has overlooked and failed to reflect in its decision the material issue of "failure of defendants' consideration", and the points of law applicable thereto; and since the Court has misapprehended the significance of the sequence of facts which had precluded appellants from appealing the District Court's "Stipulation of Dismissal" within one year's time thereof; and since the Court has overlooked the pertinent analogous principles of law set out in Kelly v. Greer, 334 F2d 434 (1964-CA-3d Cir.); and since the Court has failed to follow the Supreme Court's applicable teaching in Klapprott v. U.S. (1949) 335 U.S. 601, 614-615, and likewise the teaching in Haines v. Kerner, 404 U.S. 519 (1972); and since the Court has utilized several citations in support of its several conclusions etc. which are inapposite in their material applications to the case at bar; and since the Court had used citations to support its conclusions which are in evident conflict with analogous holdings in the Second Circuit, appellants necessarily respectfully suggest, and pray for rehearing "in banc", and additively pray, that such other and further relief be given to these appellants as the Court considers to be just and warranted under the involved facts, circumstances, and law applicable thereto.

Respectfully submitted,

For the appellants

by: E. Pfotzer

Edmond Pfotzer - pro se

E. John Pfotzer

E. John Pfotzer - pro se

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 1977, I forwarded by U.S. certified mail--return receipt requested--postage prepaid--two copies of appellants-plaintiffs' foregoing "Petition For Rehearing In Banc" to: appellees-defendants' (Amercoat Corporation and Ameron, Inc.) counsel, Kevin J. Maher, Esq., Maher & Maher, 955 Main Street, Bridgeport, Connecticut 06601.

E. John Pfotzer

E. John Pfotzer - pro se